In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 452

MARTIN MARIETTA CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B, pp. 4a–10a) is reported at 376 F. 2d 430. The Federal Trade Commission's "Order Granting In Part, and Denying In Part, Application For Modification Of Order To Cease and Desist" (R. 135–136)[1] is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, p. 11a) was entered on April 11, 1967, and a petition for rehearing was denied on May 8, 1967

[1] "R." refers to the one-volume Joint Appendix printed for use in the court of appeals.

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(Pet. App. D, p. 12a). The final decree of the court of appeals (Pet. App. E, p. 13a) was entered on May 22, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court of appeals is authorized to review a denial by the Federal Trade Commission of a motion to "modify" a final consent order, when it is apparent from the face of the motion that it is in fact an untimely motion to reconsider matters as to which petitioner waived its right to contest.

STATUTES INVOLVED

The statutory provisions involved are Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)) and Section 11(b) of the Clayton Act (15 U.S.C. 21(b)), whose terms are, in all material respects, identical. The relevant portion of Section 5(b) of the FTC Act is as follows:

> * * * Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such

petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

STATEMENT

In January 1961 the Commission issued a complaint (R. 1–16) charging petitioner with having violated Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by its acquisition of numerous properties and companies engaged in the production of concrete pipe, cement, lime, and construction aggregates. The complaint alleged that, largely as a result of these acquisitions, petitioner "has become one of the two hundred largest industrial companies in the United States. Net sales of American-Marietta [2] and subsidiaries in the year ended November 30, 1959, reached a record $323,648,000, representing a 6000 percent

[2] Martin Marietta is a successor to American-Marietta by virtue of a consolidation effected October 10, 1961 (R. 16).

increase over its net sales of $5,297,146 reported in fiscal 1942." (R, 3.)

On February 5, 1963, more than two years after issuance of the complaint, a consent agreement was negotiated. It contains the following language (R. 38):

> 5. Upon entry of this Consent Order, respondent waives any further procedural steps before the hearing examiner and the Commission, a statement of findings of fact and conclusions of law, and all of the rights it may have to challenge or contest the validity of the order to divest and to cease and desist entered in accordance with this agreement.
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> * * * * *
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> 9. The following order is agreed to be dispositive of all the issues in this case and may be entered in this proceeding by the Commission without further notice to respondent. When so entered, it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the same manner and within the same period provided by statute for other orders.

By the terms of the agreement, petitioner was given 24 months to divest itself of the various acquired properties, including 13 aggregates (*i.e.*, crushed stone, sand, and gravel) plants or quarries (R. 66). Petitioner has divested itself of only five of the 13. According to its own figures (R. 72–73, n. 4), the book value of all 13 plants was approximately $3.6 million, and the book value of the eight which remain unsold is approximately $3 million.

Petitioner did not seek judicial review of the March 12, 1963, order and it became final by operation of law 61 days later. 15 U.S.C. 21(g), (c), 45(g)(c). In September 1964, petitioner directed a letter to the Commission requesting modification of the order to permit it to retain the eight unsold plants. The letter (which the Commission treated as a motion to reopen and modify R. 87), alleged changed factual circumstances since the entry of the order as well as facts existing at the time of the order (R. 85). However, the "changed facts" upon which petitioner principally relied was simply its disposal of the five aggregates properties and most of its concrete pipe plants pursuant to the terms of the order (R. 72, 73). With respect to the unsold aggregates plants, petitioner alleged that it would find it difficult to compete without them and that it was unlikely anyone would want to purchase them (R. 79–81).

After considering the motion, an answer by its Bureau of Restraint of Trade (R. 87), a reply to that answer by petitioner (R. 99), and a supplement to the reply (R. 122), the Commission, on January 12, 1966, without hearing oral argument and without issuing a formal opinion or findings of fact, modified the order by striking the Greystone quarry from the list of those quarries to be divested.[3] It denied further modification because "there has been no showing made that changed conditions of fact or law or the public interest warrant modification * * *" (R. 135–136).

[3] This quarry is under a long-term lease to Vulcan Materials and is not under petitioner's control (R. 81, 92).

Petitioner, on February 7, 1966, moved for reconsideration (R. 136–138) and requested evidentiary hearings to "resolve the factual disputes." The Commission denied this motion on February 18, 1966, stating that "even if the facts set forth by [petitioner] in its application to modify the consent order are taken as true, there has been no showing made that changed conditions * * * warrant modification" (R. 139).

The court of appeals ruled that the relevant statutes governing judicial review of Commission orders—Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. 21(b)—do not provide for judicial review of the order entered in this case. However, as a separate ground for refusing to review the Commission's refusal to modify its order, the court also noted that the original order to divest had been issued on consent and that petitioner had not challenged the Commission's jurisdiction to enter the order or alleged lack of consent to its entry. In these circumstances, the court held that petitioner had waived objection to the terms of the order and could not challenge the Commission's refusal to modify its terms.

ARGUMENT

The petition for a writ of certiorari seeks to raise the question whether the refusal by the Federal Trade Commission to modify a final order previously entered by it is reviewable by the courts of appeals. If the issue were in fact presented by the facts of this case, it might be a substantial one, albeit we note that the

provisions governing judicial review of FTC orders do not appear to contemplate review of such denials by the courts of appeals and that, if such review is unavailable, it would still be arguable that a district-court action might lie. However, we view the issue as not truly presented.

Petitioner's motion was not a *bona fide* request for modification based upon changed circumstances. The only substantial change alleged by petitioner was directly traceable to its own partial compliance with the terms of the order sought to be modified. In effect, petitioner urged that the order to which it had consented was broader than necessary to cure the anti-competitive effects arising from the acquisitions which formed the basis for the original complaint. Doubtless, petitioner was entitled to ask the Commission to reconsider the order. But then to rely upon the Commission's refusal to modify as the basis for seeking judicial review was a transparent attempt to circumvent the statutory limitations upon judicial review of Commission orders. In entering into the consent settlement, petitioner had expressly waived its right to contest the order; and even if it had not, the sixty-day period for seeking judicial review of the Commission order had long elapsed when this review proceeding was commenced.

In sum, for the court of appeals to have agreed to review petitioner's case would have been to grant untimely and improper review of the consent order itself, for, to repeat, no genuinely changed circumstances were alleged and the basis of the petition for modification was simply that the original consent or-

der had been improvident. Such review was beyond the power of the court of appeals to grant. That is the teaching of *Securities and Exchange Commission* v. *Louisiana Public Service Comm.*, 353 U.S. 368. Involved in that case was a divestiture order which had been entered after a full hearing pursuant to Section 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79k(b)(1). The Louisiana Public Service Commission—which had had notice of the hearing but had not participated—moved to reopen the proceeding after the order became final, alleging, not a change of conditions, but error in the original hearing. The SEC's refusal to reopen the proceedings in these circumstances was held by this Court to be unreviewable. As in the instant case, the facts showed an attempt to cast a tardy petition to review a final order as a motion to reopen and modify. If a non-participant in the proceeding may not obtain judicial review in such a case, then clearly a party who is bound by the order through its freely given consent should have no greater right. Cf. *Swift & Co.* v. *United States*, 276 U.S. 311.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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